(5)

No. 91-1600

In The
Supreme Court of the United States
October Term, 1991

HAZEN PAPER COMPANY, et al.,
Petitioners,

v.

WALTER F. BIGGINS,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF MANUFACTURERS AND ASSOCIATED INDUSTRIES OF MASSACHUSETTS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JAN S. AMUNDSON
General Counsel
QUENTIN RIEGEL
Deputy General Counsel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Penn. Ave., N.W.
Washington, D.C. 20004
(202) 637-3058

STEPHEN S. OSTRACH
(Counsel of Record)
NEW ENGLAND LEGAL FOUNDATION
150 Lincoln Street
Boston, MA 02111
(617) 695-3660
Attorneys for Amici Curiae

May 1, 1992

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

The National Association of Manufacturers ("NAM") and the Associated Industries of Massachusetts ("AIM") request leave to file the appended amicus brief in support of the petition for a writ of certiorari filed in this case by Petitioners. The two associations are business organizations whose members include nearly all of the largest private employers in Massachusetts and the nation.

NAM's members employ approximately 85% of all workers in the nation's manufacturing sector, including hundreds of thousands of workers over the age of forty whose employment status is affected by the Age Discrimination in Employment Act ("ADEA"), the statute at issue in this case. AIM's members employ a substantial majority of all workers in the Commonwealth of Massachusetts, including tens of thousands of workers whose employment status is affected by the ADEA.

As discussed in the appended brief, NAM and AIM believe the decision of the Court of Appeals in this case makes two highly significant misreadings of the ADEA. NAM and AIM request the opportunity to file the appended amicus brief which discusses those errors of law and explains how and why those errors will, unless corrected by this Court, cause serious injury to American businesses and the ability of American businesses to compete in the world marketplace.

Amici believe that their brief may provide the Court with a perspective on the importance of the issues raised by the petition in this case which may assist the Court in ruling on that petition.

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Boston, MA 02111
(617) 695-3660
Attorneys for Amici Curiae

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INTEREST OF AMICI

This brief is filed on behalf of the National Association of Manufacturers and the Associated Industries of Massachusetts (the "Amici"). Amici are business organizations whose members and supporters include nearly all of the largest non-governmental employers in Massachusetts and throughout the nation.

The National Association of Manufacturers of the United States of America ("NAM") is a non-profit voluntary business association with a membership of approximately 12,000 manufacturing and related businesses. Its members employ approximately 85% of all workers in the nation's manufacturing sector and produce more than 80% of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with NAM through its Associations Council and National Industrial Council. NAM's members employ millions of workers over the age of forty whose employment status is affected by the Age Discrimination in Employment Act ("ADEA"). NAM's members likewise provide their employees with a wide range of benefits under benefit plans regulated by the Employee Retirement Income Security Act of 1974 ("ERISA"). NAM and its members are thus directly and significantly affected by judicial interpretations of ADEA and ERISA.

Associated Industries of Massachusetts ("AIM") is a non-profit, state-wide organization of over 3000 members. AIM's members employ many workers over the age of forty, and thus its members are directly affected by the precedential implications of the First Circuit's interpretations of the ADEA in this case. AIM's members also include businesspeople and professional persons concerned with the economic impact of judicial decisions affecting the relationship between employers and employees.

Pursuant to Supreme Court Rule 37.2, Amici have obtained consent for the filing of this amicus brief from counsel for the petitioners. Counsel for respondent has not consented, so a motion for leave to file this brief has been filed herewith.

INTRODUCTION

Amici believe the legal issues raised by the Court of Appeals' decision here are of major importance to the nation's businesses and workers and thus warrant review by this Court. The proper relationship between ERISA and ADEA is an unresolved issue that is directly relevant to many cases filed each year throughout the nation. Similarly clarification of the appropriate standard of "willfulness" under the ADEA is crucial to rational decisionmaking in virtually every age discrimination case. So long as these issues remain unresolved, employers, employees and the lower courts will be forced to guess at the applicable rule of law in each ADEA case, a prescription for unnecessary litigation delays, expense and inconsistent decisions with outcomes dependent upon the fortuity of venue.

STATEMENT OF THE CASE

As summarized in the decision below, A. 3-49, the facts relevant to issuance of the writ are simple. Petitioner Hazen Paper Company (Hazen Paper) terminated Respondent Biggins in June of 1986. A. 6. Biggins was then sixty-two years old and was replaced by a younger person. A. 10. Biggins had worked for Hazen Paper for over nine and one-half years and, in "a few more weeks" his right to a pension would have vested. A. 13. Biggins sued Hazen Paper under the ADEA, ERISA and also brought several state law claims.[1]

A jury found that Hazen Paper had violated the ADEA by discharging Biggins and that its violation was "willful." A. 6. The jury awarded Biggins over $560,000 in ADEA damages.

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[1] Certiorari is being sought only with regard to the ADEA counts. Pet. i. This amicus brief will therefore address only the ADEA issues.

Id. However, the district court entered a j.n.o.v. on the willfulness finding. A.7, 57-62.

The Court of Appeals affirmed the finding of an ADEA violation, concluding that the jury could have found age "was inextricably intertwined with the decision to fire Biggins [because] [i]f it were not for Biggins' age, sixty-two, his pension rights would not have been within a hairbreadth of vesting." A. 14. After reviewing decisions from a number of circuits and noting the courts "have had some trouble" in applying the "willfulness" test in disparate treatment cases, A. 15, the court found an adequate evidentiary basis for the "willfulness" finding and reinstated it. A. 14-21. That finding required ADEA damages to be doubled, bringing the total ADEA damages awarded below to more than $838,000.[2] A. 23.

ARGUMENT: REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION CONFLATES ERISA AND ADEA LIABILITY AND DISRUPTS A CAREFULLY STRUCK LEGISLATIVE BALANCE.

The Court of Appeals held that the "most significant evidence on the ADEA claim" came from the circumstances surrounding Respondent's (Biggins') termination. A. 13. Indeed, the only fact mentioned in the court's entire discussion of what the jury "could reasonably have found" was that Hazen Paper decided to fire Biggins before his pension vested. A. 14. From that fact, the Court of Appeals inferred the jury could have found that "age was inextricably intertwined with the decision to fire Biggins." Id. The basis for that inference was:

[2] The Court of Appeals reduced the jury's $560,000 ADEA award to $419,000 because there was no evidentiary support for the higher figure. A. 22-23.

> If it were not for Biggins' age, sixty-two, his pension rights would not have been within a hairbreadth of vesting. Biggins was fifty-two years old when he was hired; his pension rights vested in ten years. Id.

The Court of Appeals' reasoning is flawed. Biggins' pension was about to vest not because of his age, but because of his length of service. If Biggins had been twenty-nine when he was hired, he would have been thirty-nine when he was fired and would have had no ADEA remedy. Ironically, Hazen Paper now faces ADEA liability only because it was willing to hire an older employee.

Congress has, in unambiguous terms, prohibited employers from discharging workers for the purpose of interfering with any right under an employee pension plan and has provided a "carefully integrated civil enforcement scheme" to enforce that and other statutory provisions. See ERISA §§ 502(a), 510, 29 USC §§ 1132(a), 1140; Ingersoll-Rand Co. v. McClendon, -- U.S. --, 111 S. Ct. 478, 482 (1990).[3] This Court has noted that it is "reluctant to tamper" with that carefully drafted scheme. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 147 (1985).

The Court of Appeals' decision plainly conflates two statutes which Congress designed to deal with two related but

[3] Indeed, Biggins did bring a claim under section 510 of ERISA, on which he received a $93,000 judgment. A. 24-25. Petitioners have not sought certiorari on the ERISA claim, which is separate from the ADEA claims on which review is sought. Pet. i.

nonetheless distinct problems.[4] Under the Court of Appeals' reasoning, since age is always "inextricably intertwined" with length of service and so with pension vesting, every time an employer is found liable for violating section 510 of ERISA in connection with an employee over the age of 40, it automatically becomes liable under the ADEA. The Court of Appeals' decision, in effect, engrafts upon the "carefully integrated" ERISA scheme an ad hoc bonus system which rewards some ERISA plaintiffs but not others, precisely the sort of "tampering" of which this Court has disapproved. Given that ADEA cases are the largest single source of the recent explosion in federal employment discrimination litigation,[5] the Court of Appeals' decision threatens to impose a substantial and capricious new source of liability on the American business community.

The Court of Appeals' decision here also warrants review because it is inconsistent with decisions from a number of other courts which have rejected the First Circuit's reflexive equation of length of service and age. See, e.g., Wheeldon v. Monon Corp., 946 F. 2d 533, 536 (7th Cir. 1991)(the use of pensions as proxies for age should only be on a case-by-case basis); Pickering v. USX Corp., 758 F. Supp. 1460, 1462 (D. Utah 1990); Harvey v. I.T.W., Inc., 672 F. Supp. 973, 975 (W.D. Ky.

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[4] Senator Javits, the principal Senate sponsor of the ADEA, observed that "the age discrimination law should not be used as the place to fight the pension battle." Hearings on S. 830 Before the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. (1967), cited in Pet. at 19, n.16. The "pension battle" was joined seven years later when Congress enacted ERISA.

[5] See Donahue and Siegelman, "The Changing Nature of Employment Discrimination Litigation," 43 Stan. L. Rev. 983 (1991)(noting that the employment discrimination caseload in the federal courts has increased by 2,166% since 1970).

1987)[6].

More broadly, this case raises the issue of the extent to which an ADEA plaintiff may show bias on the basis of a "proxy," here pension status, as a substitute for age in order to make out a discrimination claim. Although this Court has explicitly held that the ADEA permits use of "neutral criteria not directly dependent on age," EEOC v. Wyoming, 460 U.S. 226, 233 (1983)(emphasis added), the courts of appeals have to date reached divergent results when confronted with ADEA claims based on alleged discrimination involving high salaries and seniority.[7] Granting the petition here would offer the Court an opportunity to reaffirm that the ADEA bars age discrimination, not employment decisions made coincidentally on the basis of other, neutral criteria which may be weakly correlated with age. Such a ruling would remove uncertainty as to employers' rights and duties under the ADEA. That uncertainty harms employers who, Amici suggest, are not now able to make legitimate personnel decisions without giving undue preference to ADEA-protected employees.

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[6] But see White v. Westinghouse Elec. Co., 862 F. 2d 56 (3d Cir. 1988)(discharge of employee motivated by desire to avoid increased benefits payable after 30 years' service held to violate ADEA).

[7] Compare Bay v. Times Mirror Magazines, Inc., 936 F. 2d 112 (2d Cir. 1991) with Metz v. Transit Mix, Inc., 828 F. 2d 1202 (7th Cir. 1987)(reaching differing results on whether discharge based on salary level alone violates ADEA). See also EEOC v. Clay Printing Co., 955 F. 2d 936 (4th Cir. 1992); Gray v. York Newspapers, Inc., __ F. 2d __, 58 Fair Emp. Prac. Cas. 191 (3d Cir. 1992)(holding that seniority is not a valid age proxy for ADEA purposes).

II. THE COURT OF APPEALS' DECISION ON "WILLFULNESS" LIABILITY UNDER THE ADEA CONFLICTS WITH THE VIEWS OF A MAJORITY OF OTHER CIRCUITS AND UNDERMINES THE LOGIC OF THIS COURT'S THURSTON DECISION.

The Court of Appeals' decision to double the ADEA damages due from Hazen Paper pursuant to ADEA §7(b), 29 U.S.C. § 626(b), also warrants the granting of this petition. The court's upholding the jury's "willfulness" finding misreads this Court's decision in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985), and conflicts with the decisions of a clear majority of the other circuits which have recently addressed this issue.

In Thurston, this Court concluded that Congress enacted the double damages provision of section 7(b) in order to create a second, punitive tier of ADEA liability. Thurston, 469 U.S. at 128-29. The Court held that a "willful" ADEA violation requires a showing that the employer either knew or showed reckless disregard for whether its conduct violated the ADEA. Id. The Court explicitly rejected a rule that a willful violation exists whenever an employer who knew of the applicability of the ADEA to its operations committed age discrimination, because such a rule would lead to "an award of double damages in almost every case." Id. at 128.

Thurston was in substance a disparate impact case. Since Thurston, however, the lower courts have struggled to apply that case's holding to individual discriminatory treatment cases like this one. Unlike the situation in disparate impact cases, in disparate treatment ADEA cases a finding of discriminatory intent is a necessary element of the claim. Thus, as the district court here recognized, "a wooden application of the 'knew or showed reckless disregard' standard" would result in double damages in practically every discriminatory treatment case,

despite this Court's express rejection of such a result in Thurston. A. 57-59.

The Court of Appeals here applied Thurston in just such a wooden fashion, adopting this Court's "knew or showed reckless disregard" language "without modification or qualification." A. 20. That court recognized that its decision meant that:

> in many cases this will result in a willful violation following hard on the heels of an ADEA violation, but that is the nature of the beast in a disparate treatment case, at least until either the Congress or the Supreme Court changes the definition of willfulness. Id.

The manner in which the First Circuit applied the willfulness standard in this case demonstrates the illogic of its position. The court noted that Mr. Hazen, the owner of Hazen Paper, testified he was "absolutely" aware that age discrimination was illegal. A. 20. The court concluded that this was "as strong evidence of a knowing violation of ADEA as a plaintiff could wish." Id. Accordingly, the First Circuit overturned the district court's j.n.o.v. on liquidated damages and reinstated an additional $419,000 in "willfulness" liability. A. 21, 23. Of course since virtually every business person in the land knows that age discrimination is illegal, the First Circuit's test shields only liars or fools from double damages in ADEA cases. That is precisely what this Court in Thurston said was not the law.

The result below was not inevitable. As the Petition demonstrates, Pet. 10-12, seven courts of appeals and a district court in an eighth circuit have all held that a successful discriminatory treatment plaintiff must make some kind of higher showing to double his damages. On the other hand, three circuit courts, in addition to the First Circuit, have indicated they

will apply Thurston by its literal terms in discriminatory treatment cases, Pet. 13, n.11. Such an unusually clear division among the circuits, standing alone, strongly suggests certiorari is appropriate here to prevent the results of ADEA cases from turning on the fortuity of the particular circuit in which each case is brought.

There is also a second, related reason why certiorari is appropriate in connection with the application of the "willfulness" requirement. Virtually all of the courts which have attempted to apply Thurston in the individual discriminatory treatment context have recognized the difficulty of that task.[8] Indeed, even the First Circuit acknowledged that "[t]he courts of appeals have had some difficulty in fitting the Thurston standard of willfulness to disparate treatment cases." A. 15. The consequence of such difficulty is that, in practice, courts confronting essentially identical situations are acting inconsistently in awarding double damages under the ADEA. This is unfair to employers, to employees and to the public

[8] See, e.g., Wheeler v. McKinley Enterprises, 937 F. 2d 1158, 1163 (6th Cir. 1991)(courts have had "some difficulty in finding a definition of 'willfulness'"); Formby v. Merchants Nat'l Bank, 904 F. 2d 627, 631 (11th Cir. 1990) ("precise contours [of willfulness] are . . . difficult to delineate"); Neufeld v. Searle Laboratories, 884 F. 2d 335, 340 (8th Cir. 1989)("recurring dilemma"); Benjamin v. United Merchants & Manufacturers, Inc., 873 F. 2d 41, 43 (2d Cir. 1989) (Thurston "does not resolve the ambiguity" in "willful"); Schrand v. Federal Pacific Elec. Co., 851 F. 2d 152, 158 (6th Cir. 1988)("courts have had difficulty applying [Thurston] to disparate treatment cases"); Cooper v. Asplundh Tree Expert Co., 836 F. 2d 1544, 1548 (10th Cir. 1988)("Courts have long struggled to define 'willful' under the ADEA."); Lindsey v. American Cast Iron Pipe Co., 810 F. 2d 1094, 1099 (11th Cir. 1987)(Thurston is "less helpful in disparate treatment cases"); Dreyer v. Arco Chemical Co., 801 F. 2d 651, 656 (3d Cir. 1986)("the courts have struggled with what constitutes a willful violation of the ADEA").

interest which always suffers when arbitrariness replaces the rule of law.

Amici believe that the extreme difficulty which courts have expressed in applying the teaching of Thurston to the very different situation presented by individual discriminatory treatment cases, and the evident split in authority which has developed as the courts have struggled to perform that task, fully warrant the exercise of this Court's power to grant the writ of certiorari prayed for here.

III. Because the Court of Appeals' Decision Will Increase the Number and Cost of ADEA Cases and Require Multistate Employers to Treat Employees in Different States Inconsistently, the Negative Impact of This Case on Businesses Warrants Granting the Writ.

The decision below means that every plaintiff over the age of 40 who files a claim under §510 of ERISA will routinely add an ADEA count, necessarily increasing such cases' complexity, cost and impact on judicial resources. Moreover, such claims will not be limited to actual damages, but will invariably pursue the windfall of a punitive "willfulness" doubling. Neither American businesses nor the courts should be made to endure the imposition of such harm in the absence of legislative warrant.

That harm will not even have the dubious virtue of being evenly distributed across the country. The division in the courts of appeals ensures there will be a judicial patchwork on the two issues raised by the petition here. Multistate employers will be forced to treat employees in different states differently based on the fortuity of the judicial circuit in which the employee resides or works. That is not fair to employers, nor to employees who

are entitled to equitable protection of the law.

The decision below is a paradigm of the perversion of the valid ends of employment discrimination law into a litigation lottery which showers wealth onto a fortunate few plaintiffs and their counsel. Such wealth may come in the first instance from employers, but ultimately it is taken from the businesses they operate and from the economy as a whole.

Unlike ordinary ADEA damages, which provide fair compensation for lost wages, punitive ADEA damages are a windfall. The double "willfulness" damages awarded to a successful ADEA plaintiff represents funds that will not be available for the employer to use to increase the wages of current employees, to purchase new equipment or to return to stockholders. Similarly, the additional litigation expense that a defendant must incur because it faces the threat of punitive damages represents an irrevocable misallocation of resources into a nonproductive channel.

Amici can find no indication in either of the decisions below of any "willful" intent to discriminate against Biggins on the basis of his age as "willfulness" would normally be understood. The Court of Appeals' decision to reinstate an ADEA award of nearly one million dollars thus is not just a misreading of the statutory text and of Thurston, but it creates a serious new cause of concern to the national business community whose ability to compete in a world marketplace is already far too seriously hampered by the weight of litigation.

IV. CONCLUSION

For the reasons stated above, Amici believe the Court should grant the petition for a writ of certiorari filed by Petitioners.

Respectfully submitted,

THE NATIONAL ASSOCIATION OF MANUFACTURERS AND ASSOCIATED INDUSTRIES OF MASSACHUSETTS

By their attorneys,

JAN S. AMUNDSON
General Counsel
QUENTIN RIEGEL
Deputy General Counsel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Ave., N.W.
Washington, D.C. 20004-1703
(202) 637-3058

STEPHEN S. OSTRACH
(Counsel of Record)
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